80-1393

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,
v.
TIMOTHY CREWS,
Respondent,

•

STATE OF MISSOURI,
Petitioner,
v.
TERRY CREWS,
Respondent,

•

STATE OF MISSOURI,
Petitioner,
v.
DANIEL STANLEY HELTON,
Respondent.

•

STATE OF MISSOURI,
Petitioner,
v.
WILLIE TUNSTALL,
Respondent,

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Missouri Court of Appeals, Eastern District, in these cases.

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri courts are bound by *Brintley* v. *Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980),

conflicts with this Court's decision rendered in *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)?

PARTIES

In the Missouri Court of Appeals, Eastern District, the parties were as follows:

State of Missouri, respondent, and Timothy Crews, appellant, cause No. 41073;

State of Missouri, respondent, v. Terry Crews, appellant, in cause No. 41161;

State of Missouri, respondent, v. Stanley G. Helton, appellant, in cause No. 42181;

State of Missouri, respondent, v. Willie Tunstall, appellant, in cause No. 42034.

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Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Missouri Court of Appeals, Eastern District, in these cases.

OPINIONS BELOW

The opinions in the four cases for which the writ of certiorari is being sought are printed in Appendix A. None of them have yet been published. In alphabetical order the

State of Missouri v. Timothy Crews, No. 41073, opinion filed April 29, 1980;

State of Missouri v. Terry Crews, No. 41161, opinion filed September 9, 1980;

State of Missouri v. Stanley G. Helton, No. 42181, opinion filed September 30, 1980;

State of Missouri v. Willie Tunstall, No. 42034, opinion filed October 7, 1980.

JURISDICTIONAL STATEMENT

In *State of Missouri* v. *Timothy Crews,* No. 41073, the opinion was filed by the Missouri Court of Appeals, Eastern District, on April 29, 1980, affirming convictions for robbery and kidnapping but reversing the conviction for armed criminal action. The trial court had assessed consecutive sentences of thirty years, ten years and thirty years respectively. On December 15, 1980, the Supreme Court of Missouri overruled the State of Missouri's application for transfer.

In *State of Missouri* v. *Terry Crews,* No. 41161, the Missouri Court of Appeals, Eastern District, filed an opinion on September 9, 1980, affirming convictions for robbery first degree and kidnapping, and reversing a conviction for armed criminal action. The trial court had assessed sentences of thirty, ten and thirty years to be served consecutively. On December 15, 1980, the Supreme Court of

Missouri overruled the State of Missouri's application for transfer.

In *State of Missouri* v. *Stanley G. Helton,* No. 42181, the Missouri Court of Appeals, Eastern District, filed an opinion on September 30, 1980, affirming a conviction for robbery in the first degree and reversing a conviction for armed criminal action. The trial court had sentenced the appellant to fifteen years on the robbery count and ten years on the armed criminal action count the latter to run consecutive to the former. On December 15, 1980, the Supreme Court of Missouri overruled the State of Missouri's application for transfer.

In *State of Missouri* v. *Willie Tunstall,* No. 42034, the Missouri Court of Appeals, Eastern District, issued an opinion on October 7, 1980, affirming a conviction of attempted robbery first degree and reversing a conviction for armed criminal action. The trial court had sentenced appellant to ten years for the attempted robbery and six years for the armed criminal action, the latter to run consecutively to the former.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 556.150(2), RSMo 1969; 559.240, RSMo 1969; 560.120, RSMo 1969; 560.135, RSMo Supp. 1975; and 559.225, RSMo Supp. 1976, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

This joint petition is brought as a result of the continuing controversy over the application of federal constitution double jeopardy principles to the prosecution of criminal defendants in Missouri under its armed criminal action statute, § 559.225, RSMo Supp. 1976, and in the same trial, for the felony underlying the armed criminal action charge. In each of the cases joined in this petition, the Missouri Court of Appeals, Eastern District, issued an opinion relying on the authority of *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980); *Vacated and remanded,* 445 U.S. ____ (1980), *affirmed after remand,* 603 S.W.2d 592 (Mo. banc 1980), *cert. denied,* ____ U.S. ____, No. 80-571 (Jan. 26, 1981).

The facts in each of these five cases, for purposes of the double jeopardy clause, are substantially the same, inasmuch as each of the respondents was prosecuted under the armed criminal action statute, § 559.225, RSMo Supp. 1976, and also was prosecuted at the same trial, for the underlying felony. In the cases of respondents Timothy and Terry Crews, robbery and kidnapping were both used as underlying felonies for the same count of armed criminal action. In the case of respondent Helton, robbery was the

underlying felony. In the case of respondent Tunstall, it was attempted robbery.

The issues in this joint petition are identical to those involved in the petitions in *State of Missouri* v. *Wallace D. Counselman, Jr.*, No. 80-754, *State of Missouri* v. *Donald Greer*, No. 80-997, and *State of Missouri* v. *Randy Sinclair*, No. 801-1166. Moreover, it would appear that the issues presented by all of these aforementioned petitions, and by this present petition, are identical to the issues raised in the petitions for writs of certiorari now pendng in *Hunter* v. *Delaware*, No. 80-283, and *Evans* v. *Delaware*, No. 80-749, as well as the direct appeal now pending before this Court in *Whack* v. *Maryland*, No. 80-5492.

REASONS FOR GRANTING THE WRIT

The petitioner submits that writs of certiorari should issue in each of the cases contained in this joint petition because they are all based entirely on the authority of the Missouri Supreme Court's holdings in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *affirmed after remand*, 603 S.W.2d 592 (Mo. banc 1980), which conflicts with recent decisions of this Court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri* v. *Sours*, 4-45 U.S. ____, 100 S.Ct. 2935, 64 L.Ed.2d

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[1]The Missouri Supreme Court's most recent holding in *Sours* was identical to its original holding made prior to this Court's granting of the State's petition for a writ of certiorari.

820 (1980). The Missouri Supreme Court responded to this Court's directive on August 18, 1980, by rendering an opinion in *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980), in which the Missouri Supreme Court, after expressly ruling that the Missouri legislature clearly intended that punishment be imposed for *both* armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See *Sours* v. *State, supra,* 603 S.W.2d at 603-604.

Although the Missouri Supreme Court was presented with the argument that the combined authority of both *Whalen* v. *United States, supra,* and *Brintley* v. *Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), demonstrated this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first offense is necessarily required to prove the second, if the legislature so intends, it nevertheless opined as follows:

> "The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). *Cf. Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did

not intend to separately punish the two offenses involved. *Whalen* v. *United States*, ____ U.S. ____, 100 S.Ct. 1432, 1435 (1980); *Simpson* v. *United States*, 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Iannelli* v. *United States*, 420 U.S. 770, 785-86 nn. 17-18, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). *See Jeffers* v. *United States*, 432 U.S. 137, 155, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). No United States Supreme Court opinion has considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute."

Sours v. *State, supra*, 603 S.W.2d at 593.

In discussing *Whalen* v. *United States, supra*, the Missouri Supreme Court stated:

". . . The Court expressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented." [footnote omitted.]

Sours v. *State, supra*, 603 S.W.2d at 594.

Before reasserting its position taken in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its under-

lying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the state (See Appendix B), that punishment be imposed for both crimes. *Sours* v. *State, supra,* 603 S.W.2d at 597-603. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." [footnote omitted].

Sours v. *State, supra,* 603 S.W.2d at 603.

The Missouri Supreme Court then proceeded to re-adopt its original opinion rendered in *Sours* I, but not without, again, the specter of the United States Supreme Court reappearing:

> "If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen,* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause, It would grant to the state legislature the power to define the meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would

> hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it."

Sours v. *State, supra,* 603 S.W.2d at 606.[2]

The petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In *Brintley* v. *Michigan, supra,* the appellant sought to present the following question to this Court:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is not evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in

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[2]Although this Court did not take advantage of its opportunity to "make such a ruling" when it recently denied the State's second petition for writ of certiorari in the case, *Missouri* v. *Sours,* ——— U.S. ———, No. 80-571 (Jan. 26, 1981), this presumably was because the case was moot, since this Court had been informed that the respondent had fully served both his sentences for armed criminal action, and for the underlying felony.

> armed robbery case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies."

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

The petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours* I and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions on identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II reached a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to Missouri's armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of the respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> "... [A] state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citations omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [footnote omitted; court's emphasis.]

Id., 420 U.S. at 719. See also *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

The petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen,* that:

> "In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unitentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide."

Whalen v. *United States, supra,* 100 S.Ct. at 1436. (emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> "The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal

> court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty."

Whalen v. *United States, supra,* 100 S.Ct. 1436-1437 [citations and footnote omitted; emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* stated:

> "We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress."

Whalen v. *United States,* 100 S.Ct. at 1438-1439. [emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois* v. *Vitale,* ____ U.S. ____, 100 S.Ct. 2260, 2265, 65 L.Ed.2d 228 (1980), where the test is characterized as follows:

"In *Brown* v. *Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), which in turn relied on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 31 S.Ct. 421, 422, 55 L.Ed.2d 489 (1911), we held that

'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' *Brown* v. *Ohio,* 432 U.S., at 166, 97 S.Ct., at 2225." (emphasis added.)

Illinois v. *Vitale, supra,* 100 S.Ct. at 2265.

In any event, as previously emphasized contrary to what the Missouri Supreme Court concluded in *Sours* I and *Sours* II, the double jeopardy clause of the Fifth Amendment does not prohibit multiple punishments, even for crimes that are considered to be the "same offense" under the *Blockburger* rule of statutory construction, if "specifically authorized" by Congress or a state legislature. *Whalen* v. *United States, supra,* 100 S.Ct. at 1439. This holding was recently reaffirmed in *United States* v. *DiFrancesco,* ____ U.S. ____ No. 79-567, (Dec. 9, 1980), 28 Crim.L.Rptr. 3024, where this Court observed:

"As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple

punishment. See *Whalen* v. *United States,* 446 U.S. ——, —— (1980) (slip op., pp. 3-4(; *id.,* at — (concurring opinion) (slip op., p. 2). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange.*"

In other words, "the double jeopardy clause operates as a *presumption* against finding that domestic law intends multiple offenses and multiple punishment, a presumption that can be overcome only by 'clear and unmistakable' evidence that the domestic law intends offenses and sentences be cumulated." Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 Mich. L. Rev. 1001, 1026 (1980). In the case of Missouri's armed criminal action statute, of course, even the Missouri Supreme Court readily conceded that the Missouri State Legislature "clearly and unmistakably" intended that a criminal defendant be convicted and punished for both armed criminal action *and* the underlying felony.

The petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appear to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have held that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was

held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley* v. *Michgan*); *Jones* v. *Commonwealth of Virginia,* 235 S.Ed.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State,* 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (the state's highest court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment is prohibition against double jeopardy. The defendant's direct appeal to this Court is presently pending. *Whack* v. *Maryland,* No. 80-5492. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware,* No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the

first degree and the separate crime of possession of a deadly weapon during the commission of a felony. A petition for writ of certiorari to the Delaware Supreme Court is presently pending before this court in *Hunter* v. *Delaware,* No. 80-283, as well as in another Delaware case involving this same issue, *Evans* v. *Delaware,* No. 80-749.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours* v. *State, supra,* 603 S.W.2d at 599.

Every jurisdiction in this country is awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

STATE OF MISSOURI, *Respondent,* v. TIMOTHY CREWS, *Appellant.*	**No. 41073**

Appeal from the Circuit Court of the City of St. Louis

Hon. Daniel T. Tillman, Judge.

OPINION FILED: APRIL 29, 1980.

Defendant was convicted by a jury of robbery, kidnapping, and armed criminal action. The trial court assessed consecutive sentences under the Second Offender Act at thirty years, ten years, and thirty years, respectively.

We reverse the armed criminal action conviction as mandated by Sours v. State, 593 S.W.2d 208 (Mo. banc 1980). We affirm the robbery and kidnapping convictions.

Defendant asserts the evidence at trial showed the seizure detention, and asportation of the victim was merely incidental to the crime of robbery and therefore the evidence was insufficient to prove the intent to secretly confine—a required element of kidnapping. Kidnapping is the forcible seizure, confinement, inveiglement, or enticement

of another with the intent to asport or secretly confine the other against his will. State v. Gormon, 584 S.W.2d 420, 425 (Mo.App. 1979); State v. Johnson, 549 S.W.2d 627, 631 (Mo.App. 1977). Defendant relies on People v. Levy, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965), *modified,* 15 N.Y.2d 910, 206 N.E.2d 653, 258 N.Y.S.2d 646 (1965), *cert. denied,* 381 U.S. 938 (1965). In *Levy,* the defendant forced his way into a car and in the course of a twenty minute ride robbed the occupants of the car. The *Levy* court held the defendant was guilty of robbery but not guilty of kidnapping as the detention of the victims was only incidental to the robbery. *Levy, supra,* at 204 N.E.2d 843-45, 256 N.Y.S.2d 795-97. The present facts evidence a more extensive asportation and confinement.

The victim was leaving a P.T.A. meeting at a school on Kingshighway and Reber in St. Louis, Missouri, about 8:30 in the evening. She was grabbed by defendant and another man. Defendant pointed a gun at her right temple and told her he would blow her head off. The victim offered her car keys and purse to her assailants. She asked them to leave her alone and informed them she was two months pregnant. They took $34.00 from her purse and then knocked her down before pushing her into her car. Defendant drove the three of them down Kingshighway, turned on to Interstate 44, and then drove west. The two men discussed holding her for ransom in order to get money from her husband. They returned to the school and forced her to crouch on the floor of the car while in the vicinity of the school. Defendant's accomplice picked up another car. After a service station stop, the two cars proceeded into Jefferson County, Missouri, where the victim was forced to get into the other car. The victim was then driven back to St. Louis where she was left with her car at the Jamieson exit on Interstate 44. This evidence supports the conviction of two separate

crimes—robbery and kidnapping. *Gormon, supra; Johnson, supra.*

Defendant also contends the trial court erred in not striking two veniremen for cause by reason of bias on the part of the veniremen. One venireman knew one of the state's prospective witnesses and a St. Louis County police officer. The other knew George Peach, St. Louis Circuit Attorney. Both said they were not biased and could give the defendant a fair trial. We find no error. State v. Eaton, 504 S.W.2d 12, 17 (Mo. 1973); State v. Cuckovich, 485 S.W.2d 16, 22-23 (Mo. banc 1972); and State v. Shoemaker, 183 S.W. 322, 324 (Mo. 1916). Since the answers by the veniremen were not equivocal, the trial court had no duty to question the veniremen further about any possible bias. State v. Carter, 544 S.W.2d 334, 337 (Mo.App. 1976).

The armed criminal action conviction is reversed. The robbery and kidnapping convictions are affirmed.

ROBERT E. CRIST, Judge.

ROBERT G. DOWD, Presiding Judge Concurs

JAMES R. REINHARD, Judge Concurs

Supreme Court No. 62651

IN THE

SUPREME COURT OF MISSOURI

EASTERN DISTRICT NO. 41073

September *Session 1980*

State of Missouri, Respondent,

vs. TRANSFER

Timothy Crews, Appellant.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the SEPTEMBER Session thereof, 1980, and on the 15th day of December 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of December 1980.

Thomas Simon, clerk.

Anne Berhorst, D. C.

IN THE

MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

STATE OF MISSOURI, *Plaintiff-Respondent,* vs. TERRY CREWS, *Defendant-Appellant.*	No. 41161

Appeal from the Circuit Court City of St. Louis.
Hon. Thomas W. Challis, Judge

OPINION FILED: September 9, 1980

Defendant appeals from his conviction by a jury of robbery first degree, kidnapping, and armed criminal action and resultant sentences by the court under the second offender act of 30, 10, and 30 years to be served consecutively. We affirm the convictions for robbery and kidnapping and reverse the conviction for armed criminal action.

The evidence supported a factual finding that defendant and his brother robbed the victim at gunpoint, placed her into an automobile against her will, took her into two other counties where other offenses were committed, and returned her to the City of St. Louis some two and one-half hours later. The victim was a school teacher seven months pregnant at the time. Defendant testified to an alibi and called witnesses to support that claim.

On appeal defendant raises four points, none of them relating to the sufficiency of the evidence. It is first con-

tended that the trial court erred in allowing the defendant to represent himself and in failing to have a written waiver of counsel signed by defendant pursuant to Sec. 600.051, R.S.Mo. 1978. Defendant did request that he be allowed to represent himself without counsel. This request was not granted by the court. Rather defendant was allowed to try the case with counsel available to assist and advise him. This was permitted only after extensive questioning by the Court during which the hazard of self-representation was explained thoroughly to defendant, and during which defendant demonstrated a fairly complete rudimentary understanding of legal and courtroom procedures. Defendant had available to him throughout the trial the assistance of counsel which he utilized freely and frequently. Counsel performed certain legal work such as obtaining subpoenas. In addition he approached the bench and appeared in chambers with defendant during conferences, advised the court on occasion of the legal basis for defendant's objections and contentions, conferred with defendant concerning objections and questioning of witnesses, explained to defendant the instructions which defendant could request be given, prepared and argued the motion for new trial, argued the question of the sentences to be imposed, and prepared and filed the notice of appeal. The representation accorded to defendant is frequently referred to as "hybrid." State v. Edwards 592 S.W.2d 308 (Mo. App. 1979). In essence defendant served as co-counsel with an attorney. He had the opportunity to actually try the case with the assistance throughout of counsel.

In Peterson v. State, 572 S.W.2d 475 (Mo. banc 1978), the Supreme Court held that Sec. 600.051 requires that a written waiver of the assistance of counsel be obtained and that the failure to obtain such a written waiver is prejudicial error. In State v. Burgin, 539 S.W.2d 652 (Mo. App. 1976); State v. Johnson, 586 S.W.2d 437 (Mo. App. 1979);

and State v. Tyler, 587 S.W.2d 918 (Mo. App. 1979) the courts held that hybrid representation is not a waiver of counsel but on the contrary is the utilization of the assistance of counsel and Sec. 600.051 is not therefore applicable. Defendant here accepted the hybrid representation and the court did not err in failing to obtain a written waiver of counsel.

We need not determine whether bench warnings of the danger of self-representation are required in hybrid representation cases, or whether the same requirement of "intelligent and knowing waiver" needs to be met as that required in no-counsel cases. *See* State v. Edwards, *supra.* Suffice it to say here that the extensive warnings and questioning by the court and defendant's responses thereto establish that defendant was adequately warned and made his choice with full knowledge and understanding of what he was doing. State v. Nicolosi, 588 S.W.2d 152 (Mo. App. 1979). We find no merit in defendant's first point.

Defendant's second point we set forth verbatim:

> "The trial court erred in its order of September 18, 1978 wherein it found that the defendant had mental fitness to proceed with the trial. This finding was based on a psychiatric evaluation of August 28, 1978 that did not comply with the requirements of Chapter 552 of the Revised Statutes of Missouri, Supp. 1971. This violated defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under Article I, Section 10 and 18(a) of the Missouri Constitution."

The point arises in the following context. On May 19, 1978, defendant, represented by an appointed attorney, filed a motion for psychiatric examination. That motion was denied. On July 28, 1978, defendant, now represented by retained counsel, filed a second motion for psychiatric ex-

amination. At the hearing on that day defendant's attorney stated that shortly before a previous trial setting defendant had cut himself on the arm in an attempt to commit suicide.[1] Counsel further stated he had had difficulty obtaining information from defendant although he seemed willing to cooperate; that defendant appeared to have difficulty thinking about or concentrating on the case; that defendant had difficulty remembering the evening on which the offense occurred. Counsel further indicated that he had been told that defendant had some history of glue sniffing, which counsel understood could cause brain damage. Counsel did testify that he had examined a report of mental examination, made in May 1977 in another case, which had found defendant mentally competent to stand trial. Counsel stated that defendant had not wanted that medical examination, had not cooperated in it and had not received an electroencephalogram because of his non-cooperation. On cross-examination counsel stated that the 1977 report indicated that defendant was anti-social. He also admitted that defendant had an awareness of the charges against him; that the absence of communication by defendant had been recent; that a month before the hearing defendant had been tried on another charge arising from conduct occurring at approximately the same time as the charges in this case and that in that case defendant had taken the stand and testified. Counsel also stated that defendant had made statements about hanging himself. After the hearing on August 22, 1978, the court entered the following order:

"The Court having been informed that the above-

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[1]The trial court examined the scars from this attempt. At the argument on the motion for new trial the court stated it had placed no credibility to this "attempt," feeling that the scar locaion did not indicate a bona fide suicide attempt but rather an attempt to obtain a continuance or to come under "Drope" (Drope v. Missouri, 420 U.S. 162 (1975)).

named defendant while in confinement has inflicted injury to his own person, therefore, the court, over the objections of the State, hereby sustains the defendant's motion for a second psychiatric examination and evaluation.

"Causes ordered continued at the request of the defendant.

"The Court orders that Dr. Bun Tee Co, Jr. Director of Forensic Services, Malcolm Bliss Mental Health Center or a designee of his staff proceed to the City Jail at 124 S. 14th Street, St. Louis, Mo, at a time satisfactory to Dr. Co to conduct a preliminary evaluation with the purpose of determining whether it is necessary to send the defendant to Fulton State Hospital for a second psychiatric evaluation or whether said examination and evaluation may be performed on an out-patient basis at Malcolm Bliss Mental Health Center."

On September 18, 1978 the court entered the following order:

"Pursuant to a prior Order of the Court dated August 22, 1979, (sic) a report reflecting the psychiatric evaluation of the defendant dated August 28, 1978 signed by Dr. Bun Tee Co, Jr., Director Forensic Services, Malcolm Bliss Health Center, has heretofore been filed with the Court on September 1, 1978.

"Accordingly, based upon this report dated August 28, 1978 and the report of the psychiatric examination and evaluation performed at the Fulton State Hospital dated June 15, 1977 in a cause of action which was pending in St. Louis County and said report dated June 15, 1977 having been admitted into evidence in Cause #77-2281-A, and the Court further taking notice of the entire record finds on the basis of the psychiatric reports dated August 28, 1978 and June 15, 1977 that

the above-named defendant has mental fitness to proceed.

"Causes removed from Mental Docket and set for trial on Monday, October 2, 1978 in Division #24."

Trial began on the case on November 13, 1978. No reference to a mental examination or to defendant's competency appears in the record after the order of September 18, 1978, until the motion for new trial.

Defendant's point relied on is inadequate in specifying in what way the trial court erred. Initially, it fails to explain in what way the psychiatric evaluation of August 28 did not comply with the requirements of Chapter 552. This becomes even more critical because appellant has not included as a part of the record before us either that report or the earlier evaluation of June 1977. Nor are we advised in what way the actions of the court violated defendant's various constitutional rights. Inasmuch as the question of competency to stand trial cannot be waived by going to trial (State v. Clark, 546 S.W.2d 455 (Mo. App. 1977) [14-16] and is of fundamental constitutional import (Pate v. Robinson, 383 U.S. 375 (1966)) we will attempt to address the issues which we believe are arguably before us. These appear to be two—one procedural, the other substantive.

The procedural question is whether the initial order of August 22 mandated an evaluation other than that performed by Dr. Co in the City Jail. We must presume that the two psychiatric reports which are not before us supported the court's decision that defendant had the mental competency to stand trial. Did the wording of the August order lead the defendant to believe that a further evaluation would be made other than Dr. Co's and thereby preclude him from challenging the Co evaluation under the pro-

visions of Sec. 552.020.4 & 6?[2] On the face of the order it appears the court had determined that a further evaluation would be made and that the Co examination was limited to a determination of where the examination would be conducted, not whether it would be conducted. The prosecutor and the court stated at the hearing on the motion for new trial that they believed the order did not mandate an evaluation but merely provided for a preliminary determination of where the evaluation should be conducted if the court decided that such an evaluation was needed. The oral justification or reason given by the court is not a part of the order and cannot be used to contradict the order. Green v. First National Bank of Kansas City, 236 Mo. App. 1257, 173 S.W.2d 763 (1943). On the other hand it is also apparent that the August order did not contain all of the specifics required by Sec. 552.020.2 and was not therefore the order mandated by that section. We do not believe it unreasonable for defendant and his attorney to interpret

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[2]552.020 R.S.Mo. 1978

"4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

. . .

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the physicians who rendered such opinion and to offer evidence upon the issue."

the order as a preliminary to a second order directing a psychiatric evaluation and to thereby conclude that no response was necessary to the Co report even if defendant wished to contest it or desired another examination. That does not, however, close the matter.

Upon entry of the September order denying a mental evaluation, it became apparent that the interpretation which defendant now contends he placed upon the August order (and which we find reasonable) was not the same as that placed upon it by the court. Yet at no time prior to the conclusion of the trial two months later was this difference in interpretation called to the trial court's attention. No effort was made to reopen the September order for reconsideration, to request another examination under Sec. 552.020.4, or to contest the opinion as provided in Sec. 552.020.6. There is nothing in the record to indicate that such an effort would have been unsuccessful or that the trial court would have been unwilling to reexamine its September order in light of the difference of opinion generated by its August order. Judicial procedures are not a game, certainly not when they involve matters as important as competency to stand trial. It was incumbent upon defendant to call the alleged inconsistency in the two orders to the court's attention before trial if he felt aggrieved thereby. His failure to do so precludes him from now attacking the procedure followed or to take advantage of the inconsistency in the orders.

The substantive issue reaches the more basic question of whether the evidence before the trial court mandated a competency evaluation whatever procedure was followed. Sec. 552.020.2 requires such an evaluation "whenever any judge . . . has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed . . . ." This is a continuing obligation of the trial court throughout the criminal proceeding. State v. Clark, *supra,*

[14-16]. We must look therefore to the entire record to determine whether it establishes reasonable cause to believe that defendant lacked competency to proceed. We do not find it does. The court's order of August does not of itself establish such cause. As we said in Jones v. State, 505 S.W.2d 96 (Mo. App. 1974) [1-3]:

> "The mere fact that a trial judge grants, on motion, a psychiatric examination does not automatically establish that a bona fide doubt exists as to the defendant's compentency to stand trial."

Simply out of an abundance of caution, a judge may grant such an examination where defendant has failed to establish specific reasonable cause to believe a mental disease or defect exists. We also must presume that the two psychiatric reports before the court did not establish "reasonable cause." The purported suicide attempt was discounted by the court, who viewed the scars, as not bona fide. The description of the location of the scars stated by the judge would support that assessment.[3] The order of August did not state that defendant had attempted suicide but only that he had inflicted injury upon himself. The statement of a history of glue sniffing was unsupported by anything except counsel's statement admittedly based upon hearsay. Furthermore, what that history consisted of—one episode, occasional episodes or constant episodes—was not stated, nor was there any evidence of what if any effect this history might have on his mental state other than counsel's understanding it might have some. Nor does it appear whether

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[3]"I gave no weight to this so-called suicide attempt at all because of the area where the cuts were, one being on the top of the bone, . . . on the upper portion of the left wrist, and the other being in the muscle area of the left arm. I think that anyone who makes a bona fide suicide attempt can get closer to the area where some chance of success might be." Defendant did not dispute the factual statement of the location of the scars although given that opportunity.

this history predated the 1977 evaluation and was considered therein. Defendant had been incarcerated five months after the prior examination and had remained incarcerated through the trial and there was no indication that he was presently "glue-sniffing." Nor was the alleged inability to communicate with counsel dealt with specifically. The court was also aware that defendant had shortly before testified in another case in his own behalf concerning an alleged crime occurring at approximately the same time as the ones on trial. Immediately prior to trial the court questioned the defendant at length in regard to his self-representation. His answers demonstrated full understanding of the proceedings and a better than average layman's understanding of the legal and courtroom procedures. Defendant's handling of the case through trial demonstrated an acute understanding of the testimony, many of the rules of evidence, legal principles and courtroom procedure and protocol. His testimony gave detailed and precise information on his activities and whereabouts on the night of the crimes. His questioning of witnesses, both his and the State's, while less fulsome than might have been a lawyer's, demonstrated his understanding of the points he wished to make and his ability to make them. He conferred frequently throughout the trial with his co-counsel and in those few instances where these conferences are of record demonstrated his understanding of the advice or explanation given.

The test of competency to stand trial is whether the defendant has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960); Martin v. State, 558 S.W.2d 701 (Mo. App. 1977) [4]; Jones v. State, *supra,* [1-3]. On the record before us, we find no basis for concluding that reasonable

cause existed to believe defendant lacked that competency. State v. Haley, ____ S.W.2d ____ (Mo. 1980) (No. 62132, July 15, 1980). The record strongly supports the opposite conclusion.

Defendant's next point is that the court erred in utilizing MAI-CR 2.70 in this case because the case included a charge of armed criminal action. We acknowledged in Sims v. State, 568 S.W.2d 801 (Mo. App. 1978) that MAI-CR 2.70 contained the possibility of confusion in an armed criminal action case, but held that no prejudice existed because the instructions read together properly instructed the jury. The same is true here. In State v. Tilley, 569 S.W.2d 346 (Mo. App. 1978) we upheld the use of a modified MAI-CR 2.74 in an armed criminal action case against a similar attack. Tilley does not represent, as defendant contends, an implied overruling of Simms or a judicial direction to utilize 2.74. Both cases recognized that the mandatory pattern instructions do not contain an instruction in the 2.70 series (mandatory in multiple count cases) which is designed to cover armed criminal action cases. Both Simms and Tilley recognized, therefore, that inasmuch as some instruction on multiple counts is required and none is truly applicable, that no prejudicial error exists if the instruction utilized, combined with the other instructions and verdict forms, properly advises the jury of what it must find. Those two cases did not establish any particular method of handling this vexing problem, but only held that the method utilized in each of those cases was not prejudicially erroneous.

Defendant's next point is that the trial court erred in failing to declare a mistrial when a police officer witness for the State referred to an oral statement given by defendant which had been suppressed. The matter occurred during defendant's cross-examination of the witness. Defendant had made a video-tape confession which was admitted

into evidence. He also gave an oral statement prior to the video tape which the court suppressed because not revealed on discovery. The questioning and answers of which defendant complains were as follows:

"Q. Before this video tape was played you did discuss with me about this statement, didn't you?

A. Correct, sir.

Q. Who all was present at that interrogation?

A. I don't understand, what interrogation? The video tape or your statement prior to making the video?

Q. What I'm talking about is among you who was the other officers that made the promises that if I'd say what they wanted to say—?

A. I never made you any promises.

Q. Did you learn anything from this statement that you didn't already know?

A. I don't understand the question.

Q. Was there anything in this statement that there wasn't in the police report?

A. Yes.

Q. What was that?

A. You stated to me that you needed money for your lawyer, that you had a murder charge pending in St. Louis County."

Mistrial was immediately requested. In chambers, the witness, under oath, stated that when the word "statement" was used, he understood it to mean the oral statement given before the video-taped confession. The officer did not know the oral statement had been suppressed.[4]

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[4]The oral statement was suppressed shortly before the officer took the stand. The officer was not in the courtroom at the time of the order suppressing the statement.

The trial court offered to instruct the jury to disregard the officer's answer and the prosecution offered to stipulate that defendant had been acquitted of the murder charge. Both of these offers were refused. We find no error.

It was stated in State v. Stenner, 591 S.W.2d 123 (Mo. App. 1979) l.c. 125:

> "This constitutional safeguard [inadmissibility of a failure to make statement] (and others involving the admissibility of evidence as firmly fixed in legal principles) is subject to the exception that the constitutional burden of inadmissibility is waived where no objection is made to the evidence *or such evidence is introduced or injected into the trial by the defense.* The factual background of each case as to the trial circumstances and evidence complained of is necessarily varied and only rarely similar, and each case must be separately evaluated against the foregoing principle and the recognized exceptions where waiver of the constitutional fault appears." (Emphasis Supplied).

Here the officer was unaware that the oral statement had been suppressed. The State did not question him about it. In response to defendant's initial questions, the officer differentiated between the term "video tape" and "statement" and treated them as two different things. Defendant utilized the term "statement" in his question which term the officer had previously made clear he utilized to refer to the oral statement, not the video tape. The officer's answer was responsive to the question posed by defendant. The matter complained of was injected into the case by defendant and he is in no position to complain of the testimony. The trial court held the testimony to be invited and denied the mistrial. Defendant refused any other relief.

Defendant's final point, raised by pro se brief, is that the armed criminal action conviction cannot stand in view of Sours v. State, 593 S.W.2d 208 (Mo. banc 1980) (Sours I). The Supreme Court has reaffirmed its conclusion that a conviction of armed criminal action and the underlying felony constitutes a violation of the rule against double jeopardy. Sours v. State, ____ S.W.2d ____ (Sours II) (Mo. banc 1980) (No. 61458 Aug. 18, 1980). The conviction for armed criminal action must be reversed.

Judgment of conviction for armed criminal action reversed; judgment of conviction of robbery first degree and of kidnapping affirmed.

GERALD M. SMITH, Presiding Judge

Harold Sitz, Judge, Concurs

Paul J. Simon, Judge, Concurs

Supreme Court No. 62610

IN THE

SUPREME COURT OF MISSOURI

EASTERN DISTRICT NO. 41161

September *Session 1980*

State of Missouri, Respondent,

vs. TRANSFER

Terry Gene Crews, Appellant.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full true and complete transcript of the judgment of said Supreme Court, entered of record at the SEPTEMBER Session thereof, 1980, and on the 15th day of DECEMBER 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of December 1980.

Thomas Simon, Clerk,

Anne Berhorst, D.C.

IN THE

MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

STATE OF MISSOURI, *Respondent,* vs. STANLEY G. HELTON, *Appellant.*	**No. 42181**

Appeal from the Circuit Court of Montgomery County.
Hon. Edward D. Hodge, Judge.

OPINION FILED: September 30, 1980.

Defendant was convicted by a jury of robbery in the first degree, a felony under § 560.120, RSMo. 1969, and of armed criminal action, a felony under § 559.225, RSMo. Supp. 1976. He was sentenced, consecutively, to fifteen years on the robbery count and ten years on the armed criminal action count. We reverse in part.

On March 16, 1978, defendant, accompanied by another man, entered the Site Service Station in High Hill, Montgomery County, Missouri. Defendant pointed a shotgun at the station attendant. The two men took the money from the station's cash drawer. The attendant was made to lie on the floor before he was struck on the head with some sort of instrument.

Defendant charges error in the conviction of both offenses by reason of double jeopardy, citing Sours v. State,

593 S.W.2d 208 (Mo.banc, Jan. 1980) (Sours I). He is correct as to the armed criminal action sentence.

By authority of Whalen v. United States, 445 U.S. ——, 100 S.Ct. 1432 (1980), the United States Supreme Court ordered *Sours I* vacated and reconsidered. Thereafter, the Missouri Supreme Court reaffirmed its conclusion that a conviction of both armed criminal action and the underlying felony violates the prohibition of double jeopardy. Sours v. State, ____ S.W.2d ____ (Mo.banc, Aug. 1980) (Sours II). The conviction for armed criminal action must be reversed, but the robbery conviction is valid.

Defendant also charges error by reason of the communication of the bailiff with the jury. The testimony relating to his complaint is as follows:

> THE COURT: May I have the attention of counsel. The jury has just said they have a question. I am going to have them brought back into the Courtroom so they may present that to the Court.
>
> (Deputy Clemons and Court confer at bench out of hearing of Court Reporter.)
>
> THE COURT: The jury apparently has said they do have a question as to the term "life".
>
> MS. DEAN: I don't know what to do about that.
>
> THE COURT: Let's bring them back in and I will speak to them.
>
> Would you bring in the jury, please.
>
> (The jury is then returned to the courtroom and the following proceedings are had.)
>
> THE COURT: Ladies and Gentlemen of the Jury, I was told by the bailiff that you do have a question. I can only tell you that the instructions given you

by the Court contain all of the law on this case and you must bare your verdict on those instructions.

Now, as to that question pertaining to your verdict, I can only ask that you return to the jury room and reread the instructions and see if you can arrive at a verdict.

Section 546.240, RSMo. 1978 provides that the bailiff is not to speak or communicate with the jury. In State v. Davis, 462 S.W.2d 798 (Mo. 1971), our Supreme Court stated:

> . . . communications between jurors and outsiders are not proper but always the emphasis has been concerning the case in which they are sitting and innocent communications do not require the granting of a new trial. Id. at 803.

In addition, defendant did not preserve any error by failing to object prior to his motion for a new trial. Where the misconduct of jurors is first presented in a motion for new trial, an affirmative showing must be made that defendant and his counsel were ignorant of the impropriety until after the trial. State v. Bollinger, 560 S.W.2d 606, 608 (Mo.App. 1978). The record reflects that defendant and his counsel were fully aware of the communication at trial. "A defendant is not entitled to wait until the verdict is in, thus gambling on the result, and then complain of some misconduct of a juror or some circumstance of which he had knowledge in time to present the matter to the trial court for corrective action." State v. McQuerry, 406 S.W.2d 624, 630 (Mo. 1966). A trial court must be given an opportunity to correct its errors. State v. Flowers, 597 S.W.2d 276, 277-78 (Mo.App. 1980). Defendant has failed to demonstrate "plain error" pursuant to Rule 29.12 (b).

That part of the judgment of the circuit court imposing a ten year sentence on defendant for armed criminal action is reversed. That part of the judgment imposing the fifteen year sentence for first degree robbery is affirmed.

ROBERT E. CRIST, Judge.

Robert G. Dowd, Presiding Judge, concurs

James R. Reinhard, Judge, concurs

SUPREME COURT NO. 62643

IN THE

SUPREME COURT OF MISSOURI

EASTERN DISTRICT NO. 42181 C.A.

September *Session 1980*

State of Missouri, Respondent,

vs.

Stanley G. Helton, Appellant.

Now at this day, on consideration of APPELLANT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the SEPTEMBER Session thereof, 1980, and on the 15th day of December 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of December 1980.

Thomas Simon, Clerk,

Anne Berhorst, D.C.

IN THE

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI, *Plaintiff-Respondent,* vs. WILLIE TUNSTALL, *Defendant-Appellant.*	**No. 42034**

Appeal from the Circuit Court of the City of St. Louis
Hon. Floyd McBride, Judge

OPINION FILED

October 7, 1980

Upon jury verdict, appellant was convicted of attempted first degree robbery and armed criminal action. Appellant was sentenced to consecutive terms of imprisonment of 10 years for attempted robbery and 6 years for armed criminal action.

In his appeal from his convictions, appellant raises only one contention. He argues his convictions for attempted robbery and 6 years for armed criminal action.

In his appeal from his convictions, appellant raises only one contention. He argues his convictions for attempted robbery and armed criminal action subjected him to multiple punishment for the same offense in violation of state and federal constitutional provisions prohibiting double jeopardy.

Our Supreme Court has held that conviction of armed criminal action and the underlying felony constitutes a violation of the rule against double jeopardy and that the armed criminal action conviction cannot stand. *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980). Our Supreme Court reinstated and reaffirmed their holding in *Sours* v. *State,* ____ S.W.2d ____ (Mo. banc 1980) (No. 61458, Aug. 18, 1980). Although the underlying felony in the above-cited Supreme Court cases was first degree robbery, the holding of the above-cited cases would also be applicable if the underlying felony were attempted first degree robbery. *State* v. *Smith,* ____ S.W.2d ____ (Mo.App. 1980) (No. 41165, Mo.App.E.Dist., Sept. 9, 1980).

Appellant's conviction of and sentence for attempted first degree robbery is affirmed. Appellant's conviction of and sentence for armed criminal action is reversed.

ROBERT G. DOWD, Presiding Judge

James R. Reinhard, (Judge), Concurs

Robert E. Crist, (Judge), Concurs

Supreme Court No. 62652

IN THE

SUPREME COURT OF MISSOURI

EASTERN DISTRICT NO. 42034

September Session 1980

State of Missouri, Respondent,

vs. TRANSFER

Willie Tunstall, Appellant.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the EASTERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the SEPTEMBER Session thereof, 1980, and on the 15th day of DECEMBER 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of December 1980.

Thomas Simon, Clerk,

Anne Berhorst, D.C.

APPENDIX B

Section, 556.150, RSMo 1969, is as follows:

Attempt to commit offense, punishment.—Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

(1) If the offense attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not less than two nor exceeding fifteen years;

(2) If the offense so attempted be punishable by imprisonment in the penitentiary for life, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not less than two nor exceeding ten years; but if the offense so attempted be punished by imprisonment in the penitentiary for any fixed or definite period of time other than the life of the offender, then the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not exceeding one-half of said fixed and definite period of time;

(3) If the offense so attempted be punishable by imprisonment in the penitentiary, and a maximum punishment be prescribed therefor, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not exceeding one-half of the longest time prescribed for such offense, but if no maximum punishment be prescribed, the person so convicted shall be

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punished by imprisonment in the penitentiary for as long a time as the jury or court assessing the punishment may deem proper to impose;

(4) If the offense so attempted be punishable either by imprisonment in the penitentiary or in a county jail, the person convicted of such attempt shall be punished by imprisonment in a county jail for a term not less than two months nor exceeding one year;

(5) If the offense so attempted be punishable either by imprisonment in the penitentiary or in a county jail, or by a fine, or both a fine and imprisonment in the county jail, the person convicted of such attempt may be punished by imprisonment in a county jail not exceeding one hundred dollars, or by both such imprisonment and fine;

(6) If the offense so attempted be punished by imprisonment in the county jail and fine, or by either imprisonment or fine, the person convicted of such attempt may be punished by both imprisonment and fine, or either, not exceeding one-half the longest time of imprisonment, and one-half of the greatest fine which may be imposed upon a conviction for the offense attempted;

(7) If the offense attempted be punishable by fine only, the person convicted of such attempt shall be liable to a fine not exceeding one-half the greatest fine which may be imposed upon a conviction of the offense so attempted.

Section 559.240, RSMo 1969, is as follows:

Kidnaping.—1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry

or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

2. Any person charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed or kidnaped shall have been taken, carried or brought.

Section 560.120, RSMo 1969, is as follows:

Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp. is as follows:

Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo Supp. 1976, is as follows:

Armed criminal action—penalty—exceptions.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible

for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calender years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]